IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 128 OF 2003

1. Ida Almeida,(expired), major in age, married, widow of late Gregorio Taumaturgo Almeida, landlady,

1a. Dr. Gabriel Galizzo Almeida, s/o late Ida Almeida and his wife

1b. Mrs. Janalynn Hautala Almeida, both r/o 4363, West Harrison Road, Alma, Michigan, U.S.A.,

1c. Dr. Sexagessimo Peter Rudolpho Almeida, s/o late Ida Almeida and his wife,

1d. Mrs. Marianne Lucinda Almeida, both r/o 51, Chateaux Dulac Fanton, Michigan, U.S.A.,

2. Irma Joao, major in age, married, widow of late Francis John, landlady,

3. Zoya Joao, major in age, spinster, Doctor by profession,

4. Ms. Lida Joao, all r/o H.No.1001, Binfol, Assolna, Salcete, Goa.
The Petitioner nos. 1 to 3 above all are represented by their power of attorney Lida Joao i.e. Petitioner no.4 herein. ... Petitioners.

Versus

1. Elcina Paes, housewife,

2. Cruz Paes,

3. Brenda Paes, housewife, all majors, married, r/o H.No.1002, Bainfol, Assolna, Salcete, Goa. ... Respondents.

Shri M. S. Sonak, advocate for the petitioners.

Shri A. P. Lawande, advocate for the respondents.

CORAM : F. I. REBELLO, J.

DATE : 14th August, 2003.

ORAL JUDGMENT

Rule. Respondents waive service. By consent heard forthwith.

An injunction was granted by the trial Court in a suit instituted by the present petitioners by Order dated 2nd April, 2002. The respondents herein preferred an appeal which came to be allowed. By Order dated 20th February, 2003, the learned Appellate Court in the discussion proceeded on the footing that the survey entries are in favour of the respondents and at the prima facie stage that would determine possession and, consequently, vacated the injunction.

2. The subject-matter of the present petition is at this stage restricted to survey nos.123/27 and 123/34. In respect of survey no. 123/27 admittedly the name of one of the title-holders through whom the present petitioners are claiming, is shown in the survey records. There is only a dispute in respect of the portion marked in orange in the plan which has been filed before the trial Court and which also forms part of the present paper book. The claim by the respondents was not in respect of the entire property surveyed under no. 123/27, but restricted to the disputed

portion which is marked in orange. The trial Court in vacating the injunction, therefore misdirected itself in proceedings on the basis that the petitioners herein had been unable to prove that they were in possession of survey no. 127/4. The survey documents would indicate that it is surveyed in the name of the petitioners. Therefore this clearly would amount to an error apparent on the face of the record, considering the test of grant of injunction based on the survey documents. To that extent the order of the Appellate Court will have to be vacated and the order of the trial Court will have to be restored, except insofar as survey no. 123/27 to the extent of the portion marked in orange, is concerned.

3. Insofar as survey no.123/34, admittedly the present survey documents show neither the name of the petitioner, nor of the respondents. It is however, the contention of the petitioners that the respondents filed a suit against them being Regular Civil Suit No.328/91/E. In that suit earlier an interim injunction was granted. The suit has since been dismissed and, therefore, the right which the respondents were claiming over the suit property no longer subsists. They had claimed to have purchased the property in that suit, which claim was negatived. The matter was considered by the trial Court. However, it is not clear as to which were the properties which formed the subject-matter of suit no.328/91/E. The petitioners contend

that survey no.123/34 formed the subject-matter of suit no.328/E/91. On behalf of the respondents, their learned counsel contends that it was not so and the subject-matter was restricted only to survey no.123/27. The Appellate Court has not at all considered the matter, nor addressed itself to that issue which was before it. In the light of that the Order of the Appellate Court regarding survey no.123/34 is liable to be set aside and the matter is remanded to the Appellate Court to hear the parties afresh and decide the issue insofar as survey no.123/34 is concerned.

In the light of that the following order:-

(i) The order of the Appellate Court insofar as the property identified under survey no.123/27 is set aside, except to the extent of the portion shown in orange and the order of the trial Court is restored.

(ii) Insofar as survey no.123/34 is concerned, the matter is remanded to the Appellate Court to hear the parties afresh and dispose of the same according to law.

(iii) The petitioners are further restrained from putting up any construction/compound wall in the suit property pending the hearing and final disposal of the appeal.

In the meantime, the Order of the trial Court which was continued by this Court insofar as survey no.123/34 is concerned, will continue to operate till the hearing and final disposal of the appeal.

The Appellate Court to dispose of the Appeal within three months from today.

Rule accordingly. No order as to costs.

F. I. REBELLO, J.

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